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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/928,046	08/10/2001	Sonia Gaaloul	CM2410	6951

27752 7590 04/04/2003

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EXAMINER

BUSHEY, CHARLES S

ART UNIT	PAPER NUMBER
1724	10

DATE MAILED: 04/04/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/928,046	GAALOUL ET AL. <i>gj</i>
	Examiner Scott Bushey	Art Unit 1724

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 11 March 2003 and 13 March 2003.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 5-13 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 5-13 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 10 August 2001 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.  
 If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                      | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                             | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) <u>1 sht</u> . | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Applicant's election of Group II, claims 5-11 in Paper No. 7 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

However, in view of applicant's cancellation of original claims 1-4, designated previously by the Examiner as Group I, and the addition of new claims 12 and 13, which are not restrictable from the claims of elected Group II, all of pending claims 5-13 have been examined on the merits herein.

### ***Information Disclosure Statement***

2. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

Applicant should note that the foreign references cited on pages 16 and 17 of the instant application are not readily available to the Examiner and therefore they have not been considered. Please note that all other references listed in the specification, including foreign references, U.S. patents and U.S. provisional applications have been considered by the Examiner.

***Specification***

3. The abstract of the disclosure is objected to because legal phraseology, i.e., said, comprises, comprising, and means, should not be used in the abstract. Correction is required. See MPEP § 608.01(b).

4. The disclosure is objected to because of the following informalities: page 13, line 16, “recluses” should be replaced by –recloses--.

Appropriate correction is required.

***Drawings***

5. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(4) because reference character “16” has been used to designate both the zipper in Fig. 1 and the protective medium in Fig. 3. **A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.**

6. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference signs mentioned in the description: “32”, as recited at page 11, line 30, and “21”, as recited at page 15, lines 4 and 6. **A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.**

***Claim Rejections - 35 USC § 112***

7. Claims 12 and 13 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 12 and 13 lack nexus, since they simply provide a listing of elements without any interrelationship between the elements. Clearly the disclosure provides for the use of the nebulizer within the collapsible container, however, claims 12 and 13 provide no indication of such an operational relationship.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claims 5 and 11 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Ausschnitt et al (Fig. 1; col. 3, lines 22-68).

Applicant should note that the reference is considered to anticipate applicant's non-wetting mist of instant claim 11, since the reference teaches providing a mist that allows for a film thickness deposition of 1 micron or less, while applicant's instant specification states that the invention produces a mist having droplets of between 1 and 40 microns. Clearly the reference mist must be at least as fine as applicant's and therefore must also provide the desired non-wetting mist.

***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

12. Claims 6 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ausschnitt et al.

Ausschnitt et al as applied above substantially discloses applicant's invention as recited by instant claims 6 and 10, except for the specific recitation that the water (14) that encapsulates the piezoelectric vibrating cell (16) is demineralized, and that the output of the device is at least 5g/min. Wherein use of demineralized water is well known within the art when encrustation of elements by mineral deposition is considered a problem, it would have been obvious for an artisan at the time of the invention, to utilize such demineralized water to avoid undesirable downtime for removing scale from the vibratory transducer and the diaphragm, which must remain clean for proper operation of the device. Further, it would have been obvious for an artisan at the time of the invention, to modify the power input and/or frequency of oscillation of the reference apparatus to provide a desired level of output, including that as recited by instant claim 10, which is hardly a remarkable level.

13. Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ausschnitt et al as applied to claim 5 above, and further in view of Edwards.

Ausschnitt et al as applied above substantially discloses applicant's invention as recited by instant claims 7 and 8, except for the specific recitation that the diaphragm (13) has a thickness of less than 200 microns, preferably about 10 microns.

Edwards (col. 3, lines 15-26) disclose an ultrasonic nebulizer similar to that of the primary reference wherein the diaphragm (19) thereof is on the order of about 50 microns. It would have been obvious for an artisan at the time of the invention, to construct the diaphragm of Ausschnitt et al having a thickness of less than 200 microns, preferably about 10 microns, in view of the teaching by Edwards, since such a thin diaphragm is well known to provide optimal transmission of the vibrations produced by the transducer to the liquid being nebulized, thereby minimizing energy waste while producing a given mist volume.

14. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ausschnitt et al as applied to claim 5 above, and further in view of either Buch et al or Hauser.

Ausschnitt et al as applied above substantially discloses applicant's invention as recited by instant claim 9, except for the fan used to move the mist away from the nebulizer. Ausschnitt et al does disclose the use of a pressurized gas feed to move the formed mist from the nebulizer to an end use location.

Buch et al (22) and Hauser (36) each alternatively disclose an ultrasonic nebulizer similar to that of the primary reference, wherein the movement of the mist from the nebulizer to the location of end use is assisted through the use of a fan that moves air across the mist forming liquid. It would have been obvious for an artisan at the time of the invention, to substitute a fan for the high pressure gas source of the primary reference, in view of either Buch et al or Hauser,

since such would provide a safer device by eliminating the need to utilize a high pressure gas bottle.

***Allowable Subject Matter***

15. Claims 12 and 13 would be allowable if rewritten to overcome the rejections under 35 U.S.C. 112, second paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

***Conclusion***

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

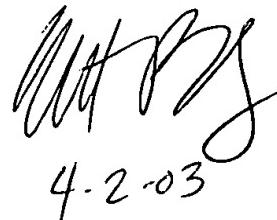
17. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Scott Bushey whose telephone number is (703) 308-3581. The examiner can normally be reached on Monday-Thursday 6:30AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David A. Simmons can be reached on (703) 308-1972. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-7718 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Scott Bushey  
Primary Examiner  
Art Unit 1724

csb  
April 2, 2003



4-2-03